BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

This petition invokes the jurisdiction of this court under Judicial Code, §240 (a), as amended by the act of Feb. 13, 1925 (43 Stat. 938). The judgment sought to be reviewed was filed July 6, 1942. [III 2348]

The District Court's opinion [I 177-201] is reported at 40 F. Supp. 675; it is briefly described at p. 5, *supra,* of the petition. The opinions in the Circuit Court of Appeals [III 2334-2337] are reported at 128 F. (2d) 889, 897; a description of these opinions appears at pp. 29-32, *supra,* of the petition.

The facts demonstrating the existence of the questions involved are set forth under the caption "Summary Statement of the Case", at pp. 4-29, *supra,* of the petition. We emphasize as all-important the trial court's 84th finding of fact—undisturbed by the Circuit Court of Appeals—that there was no evidence that decedent knew the facts making fraudulent the transactions of which petitioners complain.

This brief's function is to outline the argument in support of the reasons assigned for the allowance of the writ of certiorari. Because the decision of the Circuit Court of Appeals centers around its construction of *Wechsler v. Bowman,* 285 N. Y. 284, argument will be expedited by initially stating the principles upon which that case rests and a resume of its holding.

For fifty years prior to 1941 recurring New York authorities respecting the application of statutes of limitations have held that allegation and proof of actual fraud will be disregarded if the plaintiff could obtain *complete* relief without proof of fraud, and that statute of limitations will be applied which would bar the remedy had no fraud been alleged of proved. Such "doctrine" (honored as often in the breach as in the observance) makes immaterial, so far as limitations are concerned, the plaintiff's discovery of the fact that he had been defrauded, or his ignorance of his rights.

The leading case on this subject is *Carr v. Thompson,* 87 N Y. 160 (1881), where an agent had succeeded in settling

fictitious accounts with his principal who did not discover the accounts' falsity until more than six years had elapsed. The principal then sued to have the accounts set aside and to recover the money of which he had been cheated. The New York Court of Appeals rejected the principal's claim that because the complaint sounded in fraud, the cause of action did not accrue until the fraud's discovery (under the statutory predecessor of C. P. A. § 48 [5]); it held that since the principal could have had a complete recovery in an action for money received without proving fraud at all, the six-year statute (now known as C. P. A. §48 [1]) applicable to actions for money received governed and barred the remedy despite the principal's ignorance of the fact that he had a cause of action until more than six years after the commission of the wrong.

Subsequent New York decisions extended this "adequacy of remedy" doctrine to a wide variety of actions; to actions to set aside fraudulent conveyances (*Hearn Corp. v. Jano,* 283 N. Y. 139, where allegations of actual fraud were disregarded); to actions to recover damages for negligent acquiescence in a breach of fiduciary duty (*Potter v. Walker,* 276 *id.* 15); to various types of action *ex contractu* (*e. g., Brick v. Cohn-Hall-Marx Co., id.* 259).

Wechsler v. Bowman, 285 N. Y. 284 (1941) appears as a significant deviation from this doctrine (v., further discussion at p. 53, *infra*). In that case, a sales agent for an estate had at the instigation of its dishonest executor turned over his commission from the estate to that executor and collected another commission in equal amount from the purchaser of the estate's property. The facts remained secret for more than six years. No actual fraud was alleged in connection with the collection of the second commission from the purchaser and the only fraud alleged at all consisted of the agent's billing the estate for a sales commission and signing a receipt for that commission without disclosing his agreement with the executor and his intention to collect another commission from the purchaser. It was held that recovery of the commission collected from the purchaser was barred by the six-year statute of limitations

applicable to actions for money received (C. P. A. §48 [1]). Recovery of the commission collected from the estate was allowed on a theory of actual fraud, because the agent had later turned over that commission to the dishonest executor and an action for money received would not have constituted an adequate remedy since that commission had not been retained and the agent's estate had not thereby been enriched (285 N. Y. 284 at 294).

REASON I.

Federal question decided in conflict with applicable decisions of this court.

1. *Decisions of this court.* The equity jurisdiction of the federal courts is derived from the constitution and the laws of the United States. The principles of equity jurisprudence and the remedial processes of equity administered in the federal courts are uniform for all the states, and are subject neither to the limitation nor the restraint of state law. So far as the powers and jurisdiction of the federal courts of equity are concerned, it is alike immaterial whether the state in which such federal courts of equity sit may choose to nullify one or more equitable principles or to dispense with equity altogether. It is the duty of the inferior federal courts sitting in equity to enforce equity and good conscience in accordance with the views of this court, and to do so without regard to the views entertained by the courts of the state in which they may happen to sit. *Payne v. Hook,* 7 Wall. 421 at 430; *Noonan v. Lee,* 2 Black 509; *U. S. v. Howland,* 4 Wheat. 115; *Neves v. Scott,* 13 How. 287 at 272.

The federal courts sitting in equity will generally apply local statutes of limitation by analogy in determining the period of laches, particularly in cases where there is a concurrent remedy at law. But fraud creates an exception to this rule. *Russell v. Todd,* 309 U. S. 280 at 288, n. 1, and cases there cited; *Kelly v. Boettcher,* 85 F. 52; *Chiswell v. Johnston,* 289 F. 681; *Carr v. Hilton,* 1 Curtis 230, 238.

The rationale of this exception was stated by Miller, J., in *Bailey v. Glover*, 21 Wall. 342, 349:

> "To hold that by concealing a fraud or by committing a fraud in such a manner that it concealed itself, until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law, which was designed to prevent fraud, the means by which it is made successful and secure."

Kirby v. Lake Shore & M. S. Railroad, 120 U. S. 130 (1887) is the leading case and rules the decision at bar. There plaintiff sued in a federal court sitting in New York to set aside as fraudulent accounts settled by his testator with defendants, and for a money decree on the accounts as recast. The trial court had sustained a demurrer based on the statutory predecessors of C. P. A., §§48 (1) and 48 (5), as construed in *Carr v. Thompson, supra.*

Upon appeal to this court it was held that the *Carr v. Thompson* doctrine was repugnant to the principles of equity as administered in the federal courts and not binding upon them because inconsonant with equity, Harlan, J., writing that:

> "* * * it is an established rule in equity, as administered in the courts of the United States, that, where relief is asked on the grounds of actual fraud, especially if such fraud has been concealed, time will not run in favor of the defendant until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered." (120 U. S. 130 at 136.)

2. *The decision of the Circuit Court of Appeals.* The opinions at bar refer to and rely upon the decision of the New York Court of Appeals in *Wechsler v. Bowman, supra.*

It now suffices to point out that, assuming the *Wechsler* case has any application to the facts at bar, so much of it as would tend to bring the bar of the six-year statute of limitations (C. P. A., §§ 48 [1] or 48 [3]) into operation rests solely upon the *Carr v. Thompson* doctrine.

Since *Carr v. Thompson, supra,* has been explicitly rejected by this court as not binding on federal courts of equity, it is submitted that the conflict in decision is patent.

REASON II.

In any event, an important federal question has been decided by the Circuit Court of Appeals which has not been, but ought to be decided by this court.

The Circuit Court of Appeals' disregard of the rule in *Kirby's case, supra,* with its specific condemnation of the *Carr v. Thompson* doctrine is undoubtedly due to doubts occasioned as to the continued vitality of *Kirby's case* after this court's decisions in *Erie Railroad Co. v. Tompkins,* 304 U. S. 64 and *Ruhlin v. N. Y. Life Ins. Co., id.,* 202. Our argument here assumes that these doubts are well founded.

It is our submission that the question of whether federal or local law is applicable always presents a federal question of importance.

If federal courts of equity are now required in cases where their jurisdiction depends on diversity of citizenship to apply local case and statute law respecting limitations without regard to the inequity of the result, the bench and bar should be promptly so informed.*

This very question was mooted in *Russell v. Todd,* 309 U. S. 280 (where there was an independent ground of federal jurisdiction) but was left unanswered until occasion might require its decision. (309 U. S. 280 at 294.) This petition squarely presents the question, and the occasion for its decision is now here.

REASON III.

Conflict of decision in the Circuit Courts of Appeal on an important federal question.

The opinions in the courts below are implicit with the assumption that federal courts of equity must apply the law of limitations local to the state in which the federal court sits.

In cases decided subsequent to this court's decisions in the *Erie Railroad* and *Ruhlin* cases, *supra,* the Circuit

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* Cf., Mr. Justice Jackson in *D'Oench Duhme & Co. v. Federal D. I. Corp.,* 315 U. S. 447, 467, n. 3, and text thereto.

Courts of Appeal for the Fourth, Fifth and Eighth Circuits have ruled that federal courts of equity generally follow local law pertaining to limitations, but are not obliged to do so where application of the local law of limitations would be inconsonant with equity.

> *Fretwell v. Gillette Co.*, 106 F. (2d) 728 (C. C. A. 4); cert. den. 310 U. S. 627, reh, den. 311 U. S. 734, 313 U. S. 600;
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> *Holliday v. Wade*, 117 F. (2d) 154 (C. C. A. 5);
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> *Borserine v. Maryland Casualty Co.*, 112 F. (2d) 409, at 416 (C. C. A. 8).

In *Fretwell's case, supra*, Parker, C. J., said:

> "The rule is well stated by the late Judge Walter H. Sanborn in (*Kelley v. Boettcher*, 85 F. 55, 62) as follows: 'In the application of the doctrine of laches, the settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character, * * * The meaning of this rule is that under ordinary circumstances, a suit in equity will not be stayed after the time fixed by the analogous statute of limitations at law; but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it.' "

In *Borserine's* case, *supra, Kelly v. Boettcher* and numerous other authorities are cited in support of the same doctrine.

It is true that in none of the decisions of the Circuit Courts of Appeals just cited were circumstances discovered which made the application of the local law of limitations inconsonant with equity. But all of them recognize the right and duty of federal courts of equity to disregard the local law of limitations where its application would work inequity.

The District Courts for Idaho and Eastern Pennsylvania have recently been presented with situations where appli-

cation of the local law of limitations would have worked inequity and have unhesitatingly rejected that local law which would have otherwise barred relief because the circumstances rendered such course necessary in the interests of equity and good conscience. (*Cummings v. Langroise*, 36 F. Supp. 174 at 179, (Idaho, 1940); *Overfield v. Pennroad Corp.*, 39 F. Supp. 482 at 486, 42 F. 586 at 611-2 (E. D. Pa. 1941).

REASON IV.

Decision as to important questions of New York law in conflict with New York case and statute law.

The foregoing argument has proceeded on the assumption that this petition presents federal questions. The argument which follows proceeds on the assumption of the Circuit Court of Appeals, that the New York law of limitations must be applied. Upon that assumption it is our argument: A) that every claim for relief herein is governed by the ten-year statute of limitations prescribed by C. P. A., §53, and that actions *ex contractu* or *ex delictu* governed by C. P. A., §§48 (1) and 48 (3), would not have afforded a certain, complete and adequate remedy to decedent or petitioners; B) that the decisions of the New York courts show that the Circuit Court of Appeals has erroneously applied C. P. A. §48 (5), assuming it to be applicable; C) that *Wechsler v. Bowman*, 285 N. Y. 284, has been misunderstood by the Circuit Court of Appeals, misapplied as so misconstrued, and in any event, that its authority in a situation such as is presented at bar has been destroyed by a subsequent decision, *Nasaba Corp. v. Harfred Corp.*, 287 N. Y. 290.

A.

Assuming, *arguendo*, defendants' claim that this court is bound by the statutes of limitation of New York as construed by its courts, we say that every claim for relief at bar is governed by C. P. A., §53 prescribing a ten-year period of limitations for suits in equity. (*Gilmore v. Ham*, 142 N. Y. 1, *Matter of Rogers*, 153 *id.*, 316; *Treadwell v. Clark*, 190 *id.* 51; *Ford v. Clendenin*, 215 *id.* 10) The cited

section applies herein for two reasons; these suits are cognizable only in equity, and no action at law lies at all; and more importantly, complete, certain and adequate relief is obtainable only in equity.

The first of these propositions is settled law: one executor may not collect a claim due his decedent's estate from a co-executor in an action at law, and in such case equity has exclusive jurisdiction. *Rundle v. Allison,* 34 N. Y. 180, not only so holds,* but explicitly rules that such reason alone requires the application of the ten-year period of limitations. That case did not present the more compelling reason for the application of the ten-year statute present at bar—the lack of a certain and adequate remedy at law; to the contrary, it there appeared that but for the inability to sue at law, the plaintiff's claim would have been barred by a six-year statute applicable to actions sounding in debt.

The second and more important of these propositions is established by the leading modern authority on the application of the equity statute of limitations in New York. In that case, *Hanover v. Morse,* 270 N. Y. 86, plaintiff insuror sued to reform an insurance policy procured by it from defendant by a fraudulent concealment. The sole issue was whether the six or ten-year statute of limitations applied. It was held that in equitable actions based upon active fraud the statute of limitations did not begin to run until ten years after the fraud's discovery (270 N. Y. 86 at 91). The court enunciated the following rule as to the application of the ten-year statute:

> "In an action in equity the ten-year limitation prescribed by section 53 of the Civil Practice Act is applicable unless, in a particular action, a party has a choice of two remedies, one at law, the other in equity, both complete and adequate, and he selects the action in equity. In that event the party whose cause of action would be barred under the six-year statute, if he should elect to proceed at law, may not enlarge this time by

* Accord: *MacGregor v. MacGregor,* 35 N. Y. 218; *Wallach v. Dryfoos,* 140 N. Y. App. Div. 438; and see also cases collected at 63 A. L. R. 439.

electing to proceed in equity. Such is the rule where the remedies are concurrent." (Citing cases.)

"The exception is not applicable in cases of concurrent jurisdiction, however, if a party's remedy at law is inadequate and imperfect and he is required to go into equity to procure complete and adequate relief." (Citing *Rundle's case, supra*) (270 N. Y. 86, 89).

In *Hearn Corp. v. Jano,* 283 N. Y. 139, plaintiff waited six years after learning of conveyances in fraud of its judgment claim before seeking relief in equity. Although plaintiff had a complete remedy at law for the collection of its judgment,* and had pleaded actual fraudulent intent, the judgments of the courts below dismissing the complaint as barred by C. P. A., §48 (5) were reversed on the strength of the *Hanover* case, *supra,* because the remedy at law, while complete, was not as certain as that afforded in equity, where a ten-year period of limitations (C. P. A., §53) governed.

In *Potter v. Walker,* 252 N. Y. App. Div. 244, 276 N. Y. 15, the complaint in a stockholders' suit stated a number of causes of action against numerous corporate directors, some of whom had profited and others of whom had not benefited from the transactions in question. The first cause of action alleged that certain director defendants had profited to the extent of $2,505,000 from wrongful dealing in the corporation's property, resulting in a loss to the corporation of $7,802,743. (276 N. Y. at p. 24.) An accounting for these profits and damages was sought. Citing *Hanover v. Morse, supra,* and *Falk v. Hoffman,* 233 N. Y. 199,† the Appellate Division held (252 N. Y. App. Div. 244)

* Under the Uniform Fraudulent Conveyance Act, New York Debtor and Creditor law, §278-b.

† The significance of the citation of this case, a suit in equity to rescind, to the facts in *Potter's case* where recovery of money only was sought should be noted. In *Falk's case* Judge Cardozo held that the purpose of the action was to impress a trust upon property obtained from plaintiff by a fraud similar to that pleaded and proved at bar. Judge Cardozo adopted the view of Smith, J., dissenting in the court below (189 N. Y. App. Div. 832, 843), that it was not necessary for the complaint to demand that a trust be impressed on the monies because such was the whole purpose of the action. Petitioners submit that all property and money gained by respondents as profits from the transactions at bar are held on a constructive trust for petitioners' estate.

that no remedy at law could be as complete or effective as the remedy in equity; accordingly that so far as those directors who had profited from the transaction were concerned, the ten-year period of limitations prescribed by C. P. A., §53 governed rather than the six-year period prescribed by §48. This judgment was critically examined in the New York Court of Appeals and affirmed as to reasoning and result (276 N. Y. 15).

Potter v. Walker plainly holds that a ten-year statute of limitations is to be applied to any suit for an accounting from a fiduciary who has gained profit from dealing in his fiduciary relation and caused loss to the estate represented by him. Construing that case in *Mencher v. Richards*, 283 N. Y. 176, Sears, J., said:

> "* * * we there *(i. e.,* in *Potter v. Walker)* held in applying the Statute of Limitations that the action was to be treated in the same way as though the corporation were the plaintiff, and, that if the action was to recover profits which the director had wrongfully received and for which he would be liable to account, it was equitable in nature and subject to the ten-year statute * * *." (283 N. Y. 176 at 182.)

In *Dunlop v. Dunlop*, 259 N. Y. App. Div. 233, two officers of a small family corporation had sold property to it at an advance of $15,500. The corporation's auditors insisted that this profit be shown on its books as a charge against the officers, and appropriate journal and ledger entries disclosing the detail of the transaction were then made on the corporate books. More than six years thereafter the corporation brought suit for the profit. The Appellate Division held that no accounting was necessary, that in effect only the corporate loss (necessarily co-extensive with the profit) was being sought, that *Potter v. Walker* had no application, and accordingly that the action was barred by the six-year statute (C. P. A. 48 [1]) applicable to actions for money received. This judgment, readily intelligible in the light of the facts, was affirmed at 285 N. Y. 333. The language of the brief *per curiam* affirmance occasioned some confusion since it appeared to say that *Potter*

v. Walker applied only in those cases where profits exceeded losses—*i. e.* were not co-extensive therewith. (As noted at p. 42, *supra,* the situation in *Potter v. Walker* was exactly the reverse—losses were more than three times as large as profits.) Opportunity for further confusion has now been obviated by legislation adopting a straight six-year period of limitations for all stockholders' actions (N. Y. Laws of 1942, Chap. 851).

The other cases decided subsequent to *Potter v. Walker* cited by Judge Clark as foreclosing a recovery at bar are *Frank v. Carlisle,* 286 N. Y. 586, and *Cwerdinski v. Bent,* 256 N. Y. App. Div. 612. *Frank v. Carlisle* is a *per curiam* affirmance on the authority of *Dunlop v. Dunlop, supra,* and reference to the opinion below (261 N. Y. App. Div. 13) discloses that the situation there presented was essentially the same as that in *Dunlop's case,* viz.: the purchase of property by corporate directors at one price and its resale to their corporation at a higher price—a situation involving a "sum of money which can be computed readily" and manifestly requiring no accounting. Accordingly the six-year statute of limitations barring actions for money received was held applicable. *Cwerdinski v. Bent, supra,* a stockholders action for waste, did not present a situation where profits were gained from dealing in the corporation's property and there was no occasion at all for an accounting.

Respondents urged below and the Circuit Court of Appeals appears to have held that actions *ex contractu* for money received or in tort for damages (governed respectively by subdivisions 1 and 3 of the six-year statute, C.P.A. §48) constituted concurrent remedies at law as certain, complete and adequate as were available in an equitable suit for an accounting.*

Petitioners submit that this is manifestly erroneous. In equity an accounting can be had from those respondents

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* Clark, C. J., even asserts [III 2337; 128 F. (2d) 889 at 896] that "New York law has always been quite definite that an equitable remedy is not to be had on a claim such as this against agents, even if an accounting is asked for." This statement is not supported by the cases cited therefor; the leading case, *Marvin v. Brooks,* 94 N. Y. 71, holds that an agent to deal in property can always be required to account in equity.

guilty of fraud or conscious participation in a breach of trust. On such accounting such respondents will be jointly and severally liable as constructive trustees *ex maleficio,* and this without regard to whether the profits have been retained by them, or diverted to others by prior assignments, syndicate arrangements or devices of any other nature whatsoever. Profits can be followed in cash or property until the equity of a *bona fide* purchaser for value intervenes. If the balance on such accounting equals or exceeds the decedent's loss, then this is the measure of recovery—for equity will not permit a fiduciary to profit from abusing his trust, and this quite independently of theories of rescission or affirmance. If the balance on such accounting is less than the decedent's loss, then equity will ascertain the difference and charge the difference against the wrongdoing defendants so that decedent's estate may be made whole. (*Frier v. J. W. Sales Corp.,* 261 N. Y. App. Div. 388; *Falk v. Hoffman,* 233 N. Y. 199; *Buffum v. Barceloux,* 289 U. S. 227.)

In contrast, the relief obtainable by an action *ex delictu* for damages is demonstrably uncertain. Were the value of Houde's stock found to be less than the price at which a sale had supposedly been effected on Oct. 11, no damages could be recovered. Similarly, were the value of Houde's stock found to have been less than $6,000,000, the price at which it was resold in November, the recovery would necessarily be less than that obtainable in equity on an accounting for unlawful profits. (*Rothschild v. Mack,* 115 N. Y. 1, 8; *Reno v. Bull,* 226 *id.* 546; *Falk v. Hoffman, supra.)*

On the other hand, the remedy at law for money had and received is not merely uncertain, but plainly inadequate. The liability in an action for money received is several and not joint. But in equity the liability would be joint and several. The distinction has obvious importance in the suits at bar. Sued in equity, Cooley, the Bank and its officers, at the least, would be jointly and severally liable for the entire profit* realized upon the resale in Novem-

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* *I. e.,* 100% of the profit on the resale after being increased by the elimination of items of expense improper because incurred in the course of perpetrating a fraud. Such items are substantial [Ex. P-192].

ber, less only such sums as must be restored by decedent by reason of his participation in the syndicate which he supposed was formed by Cooley. But in an action at law, these respondents would only be liable for the profits which they obtained and retained. *(Wechsler v. Bowman,* 285 N. Y. 284 at 294. When it is remembered (petition, pp. 21-2, *supra*) that profits in huge amounts were realized from these transactions which never reached the hands of the respondents at all (by reason of income-tax avoidance arrangements), and when it is seen that upwards of forty persons (counting partnerships as single entities) received profits derived from the Bank's transactions in Houde's stock prior to Dec. 6, 1928, the inadequacy of an action for money received becomes clear. Less than 20% of the profits realized before Dec. 6 were retained by the Bank; and a part of those profits was in turn transmitted to Central and Eastman-Dillon. More than 80% of the profits realized prior to Dec. 6, 1928, never came into the Bank's hands at all, but were distributed by it and its officers pursuant to the terms of a syndicate agreement which provided that the liability of the subscribers should be several and not joint. About 95% of that profit was realized under the terms of agreements made between the Bank, its officers and Cooley prior to decedent's return from Europe,—*i. e.,* through the syndicate provided for by Exs. P-112/113. But not all of the recipients of such profits were syndicate subscribers. Some of the allottees of participations in the syndicate (including Cooley, Wurst, Rea and Sawyer) so arranged matters that all or part of their syndicate profits should be held for the benefit of or paid directly to others.

Can it be seriously argued that forty or more actions for money received offer as complete and adequate a remedy as a single suit for an accounting in which joint and several liability would be imposed and profits in *property* and money traced? Is not the situation at bar one which presents "entanglements that (call) for discovery and accounting?" (Cardozo, J., in *Buffum v. Barceloux,* 289 U. S. 227 at 235; and see *Falk v. Hoffman,* 233 N. Y. 199).

No New York case can be found which holds under circumstances such as these that an action for money received

would constitute as complete and adequate a remedy as that afforded in an equitable suit for an accounting. The cases cited to the contrary by Clark, C. J., [III 2337; 128 F. (2d) 889 at 897] involved relatively simple situations devoid of the slightest complexity.* Not one of these authorities involved a situation remotely comparable to that at bar where large portions of the profits were neither obtained or retained by those guilty of fraudulent breach of trust.

Finally it is to be remembered that an action *ex contractu* for money received constitutes a waiver of any claim in tort for damages, a matter of great importance at bar where there is substantial evidence that the value of Houde's stock greatly exceeded the profits derived therefrom by the respondents. In equity damages would be assessed to the extent that restitution of profits failed to make decedent's estate whole. In an action for money received, the victim of the fraud would be required to sacrifice the additional damages he sustained in order to obtain restitution of profits which a fraud feasor can not be entitled to retain under any circumstances.

Furthermore, an action for money received would not have furnished complete relief even with respect to the profits realized from the syndicate allotments to the Bank's officers or the kick-back payments made to them by Cooley. Cooley and the Bank's officers had diverted the bulk of these profits to others (v., petition, pp. 21-2 *supra)* and no action for money received lay against them for their recovery. *(Wechsler v. Bowman,* 285 N. Y. 284 at 294.) The Bank shared its commission with Central and Eastman-Dillon (v., petition, p. 22 *supra*), and accordingly an action for money received would have only permitted recovery of that portion of the commission which it retained.

**Carr v. Thompson,* 87 N. Y. 160, and *Mills v. Mills,* 115 *id.* 80, involved the liability to account of a *single* defendant, *Keys v. Leopold,* 241 *id.* 189, that of *one* firm of brokers, *Roberts v. Ely,* 113 *id.* 128, that of the executors of *one* wrongdoer. *Frank v. Carlisle,* 261 N. Y. App. Div. 13 (aff'd. 286 N. Y. 586, on the authority of *Dunlop v. Dunlop, supra*) involved more than one defendant, but is not at all in point, for there, as in *Dunlop's* case, *supra,* the plaintiff was seeking to recover losses under the guise of profits—the two being necessarily co-extensive (cf., 259 N. Y. App. Div. 233, 235). The same situation was presented in *Czwerdinski v. Bent,* 256 N. Y. App. Div. 612, an action for waste.

B.

Petitioners submit that the decision of the Circuit Court of Appeals to the effect that the respondents' liability for fraud is barred by C.P.A., § 48 (5) is contrary to applicable New York case and statute law.

One who obtains fiduciary employment without disclosing his intention to deal in the subject matter of that employment, and every fact and circumstance touching his fitness to enter into that employment is guilty of active fraud as a matter of law. (*Heckscher v. Edenborn*, 203 N. Y. 210; cf., *Edenborn v. Sim*, 242 U. S. 131.) In the present suits it is indubitable that at the time the Bank acquired its agency from decedent, it intended to deal in the subject matter thereof for its own profit and for the joint profit of Central and Eastman-Dillon. There is no suggestion that it disclosed that intention to decedent; to the contrary, it appears that such intention was deliberately concealed from decedent. (See, petition, pp. 7-10, *supra*). There is neither evidence nor finding which could support any inference, however remote, that decedent was ever on notice of the facts constituting this fraud.

In *Michoud v. Girod*, 4 How. 503, this court, reviewing the pertinent authorities in New York and England, said:

> "The rule of equity is, in every code of jurisprudence with which we are acquainted, that a purchase by a trustee or agent of the particular property of which he has the sale, whether he has an interest in it or not * * * carries fraud on the face of it." (4 How. 503 at 553).

The evidence in the present suits reviewed at pp. 10-17, *supra*, establishes that here the frauds in the execution of the agency were deliberate and not merely constructive, being accompanied and consummated by deceitful representations and concealments.

We review under numbered subdivisions the arguments urged by respondents below, and apparently adopted by Clark, C. J., for the proposition that respondents' liability

for active fraud in this connection was barred by C.P.A., §48 (5).

1. Respondents urged below and Clark, C. J., appears to have agreed that the fraud perpetrated on decedent could have been completely redressed by an action for money received, citing *Wechsler v. Bowman, supra,* for such proposition.

This is manifestly unsound. Assuming (but not conceding) that actions for money received would permit recovery of the brokerage commission collected by the Bank from decedent and a portion of the profits realized by the Bank's officers, such recovery constitutes but a minor fraction of the profits realized from the fraudulent transactions and an insignificant fraction of the damages sustained as a result thereof. In essence, petitioners' remedy (sought promptly after they gained knowledge of their rights) is being barred because their testator had another cause of action through which, had it not been concealed from him, some moiety of the actual damage sustained might have been recovered. Neither *Wechsler's case* nor any other New York authority supports such an argument which does plain violence to the language of C. P. A. §48 (5) postponing accrual of causes of action for fraud until such time as the facts constituting such fraud are discovered.

2. Respondents argued below, and Clark, C. J., appears to have agreed that the arrangements made between the Bank, its officers and Cooley prior to the decedent's return from Europe were mere minor "details", the knowledge of which was immaterial in view of decedent's participation in the syndicate formed long after a supposedly *bona fide* sale to Cooley had been effected, after decedent had been assured by Wurst that Cooley was the actual purchaser of Houde's stock and not a nominee, and after the sale had been completely consummated.

With respectful deference for Judge Clark's views, it must still be said that this is a most breath-taking proposition. It might as well be argued that it is a mere detail that the samples upon which a man buys a mine turn out to have been salted. *(Cf., Mudsill Mining Co. v. Watrous,* 61 F. 163).

It is petitioners' submission that the very core of their lawsuits is that during decedent's absence abroad and while the Bank was acting as his fiduciary, the Bank and its officers arranged to and did acquire substantial interests and complete control of the stock for which the Bank was an agent to sell, and thereafter and by fraudulent misrepresentations induced decedent reluctantly to consummate a sale to which he was not bound. Respondents did not plead and never have claimed that decedent knew of the arrangements made during his absence in Europe, and the trial court specifically found that there was no evidence that he had such knowledge. Under these circumstances to assert that the decedent "had actual knowledge of the basic and material facts with respect to the Houde transactions"* is equivalent to an assertion that the victim of a fraud has full knowledge of the facts without knowing those facts which make the transaction fraudulent. This is a solecism as fantastic as a Hamlet without the Prince of Denmark. Its fallacy is sufficiently indicated by Judge Frank [III 2340-2; 128 F. (2d) 889 at 898-9].

3. Respondents argued below, and Judge Clark appears to have agreed that the fact that decedent participated in the syndicate and knew that the Bank had loaned money to Cooley was enough to make it immaterial that he was not apprised that this syndicate and loan had been arranged for long before decedent received a notice that a sale had been effected to Cooley. *Buffum v. Barceloux Co.*, 289 U. S. 227, furnishes a complete answer to this claim. In that case a trustee in bankruptcy sued to recover the value of property fraudulently conveyed by the bankrupt and acquired by the defendant. The conveyance was by way of pledge to defendant which it had then foreclosed under the form of a public sale.

Judge Cardozo, speaking for this court, said:

> "The unconscionable sale is not to be viewed in isolation, as something disconnected from the pledge, an accident or afterthought. It was the fruit for which

* Trial court's fifth conclusion of law (I 245) approved by Clark, C. J. [128 F. (2d) 889 at 896; III 2335]

the seed was planted, or so the trier of the facts might look at it." (289 U. S. 227 at 233).

In the suits at bar, the trier of the facts had no option as to whether or not the syndicate and the loan were accidents or afterthoughts. Respondents' own testimony (see petition, pp. 11-14, *supra*) and Exs. P-112 and P-113 left no choice of inferences to the trier of the facts and compel the holding as a matter of law that the syndicate loan and the kick-back payments by Cooley to the Bank's officers were the fruits for which the seed had been planted long before decedent was informed that his stock had been sold to Cooley.

4. Judge Clark's holding (III 2335; 128 F. (2d) 889 at 896) that petitioners could not recover without proving a conspiracy to defraud is supported by no citation of New York authority. New York and other authorities establishing that the tort and not the conspiracy is the gravamen of the action are reviewed in the cases cited in the note hereto.*

Assuming (but not conceding) that proof of conspiracy to defraud decedent "in or about the month of July, 1928" (Complaint, Par. III [I 14]) rested on "highly involved" inferences [Clark, C. J.: III, 2336; 128 F. (2d) 889 at 896] the arrangements made between the Bank, its officers and Cooley prior to decedent's return from Europe were conspiratorial and fraudulent as a matter of law; indeed, the the testimony of these respondents, the documents they then created and the avowals of their own counsel foreclose controversy on this issue. (See petition, pp. 11-14, *supra.*)

It is our submission that suitors in equity have a right to such relief consistent with their pleadings as may be required by their proofs in the light of equity and good conscience. Assuming, but not conceding, that there was no conspiracy formed "in or about the month of July, 1928," petitioners pleaded and conclusively proved that conspiratorial frauds were being carried into execution during the early part of October. (See, petition, pp. 10-14, *supra.*) They

* *Brackett v. Griswold*, 112 N. Y. 454 at 466; *Howland v. Corn*, 232 F. 35 at 40 (C.C.A. 2); *Lewis Co. v. Columbia Corp.*, 80 F. (2d) 862 at 864; *Barry v. Legler*, 39 *id.* 297 at 303.

were accordingly entitled to relief.

5. We submit that the opinion of Judge Clark contains palpable errors in reasoning on the subject of notice, and that the applicable New York authorities are in conflict with his holding.

The principles governing the subject of notice as starting the running of the statute of limitations are well settled. Where a person has knowledge of facts of a character which would reasonably put him on inquiry, and such inquiry, if pursued, would have led to a discovery of the fraud, he will be charged with having discovered it if he had pursued with reasonable diligence the inquiry when he should have done so. The facts must be such as to create a duty to inquire and there must be avenues of inquiry which, if pursued, would disclose the truth and expose the fraud.*

Were any facts known to decedent which created a duty of inquiry? Before such a duty could arise, the decedent must have had reason to believe that the Bank never had intended to act as his agent and that it and its officers had acquired interests in his stock while purporting to be acting as his agent. The trial court's 84th finding of fact is tantamount to a finding that the decedent never knew of these facts. Judge Frank points out that they were "elaborately concealed."

There is the further question: Were there avenues of inquiry open to decedent which, if pursued, would have exposed the fraud and disclosed the truth? Respondents' testimony establishes that no avenues for such inquiry existed: Exs. P-112/3 were kept in the private files of the parties and the arrangements reflected therein were not disclosed to the Bank's own directors, much less to decedent.†

Finally, any duty of inquiry which could conceivably have been imposed upon decedent (and we deny that the facts known by decedent were such as to put him on inquiry) was completely discharged on Oct. 18 when he demanded, received and acted on Wurst's assurances that Cooley was a

* The text is paraphrased from the opinion in *Bancroft v. Woodward*, 183 Cal. 99, and embodies the principles applied in the New York and Federal courts (*Higgins v. Crouse*, 147 N. Y. 411; *Williamson v. Brown*, 15 N. Y. 354; *Fleischacker v. Blum*, 109 F. (2d) 453).

† I 507, 781-3; II 994, 1048-51, 1053-5; III 2271-2.

bona fide purchaser and not a nominee. The pertinent principle is clearly stated (citing New York and other authorities) under the title Notice, §31, 46 C. J. 546:

> "Consequently, when one has sought the best authority to ascertain the truth of rumors or statements which have put him on inquiry, and has then been misled, the person misleading him cannot be allowed to support rights by insisting that the party shall still be chargeable with notice of statements which he has endeavored in vain to verify. * * * After inquiry has been made and proved futile, further information of a vague and definite character is insufficient to put the party upon inquiry."

C.

We stated at the beginning of this brief (p. 35, *supra*) and now show that *Wechsler v. Bowman,* 285 N. Y. 284, represents a significant deviation if not departure from the rule in *Carr v. Thompson.* It will be recalled that in *Wechsler's* case the sales agent was held liable on a theory of fraud for a commission collected by him from an estate which he had later turned over to its dishonest executor, in the meantime having at that executor's instance arranged to collect a further commission from the purchaser of the estate's property.

A principal, whose agent has violated his duties, has among other remedies against the agent an action in contract, in tort and in *quasi* contract (2 Restatement of Agency, §399, pp. 903-4). Under the *Carr v. Thompson* doctrine any one of these remedies (each governed by C. P. A., §48 [1]) lay against the agent in *Wechsler's case* for both commissions collected by him, *i. e.*, the commission collected from the estate and that collected from the purchaser.

In *Wechsler's case,* the facts having remained secret for more than six years, the principal's action thereafter brought to recover the commission collected from the purchaser was held barred by the six-year statute of limitations under the *Carr v. Thompson* doctrine. No acts of fraud were alleged in connection with the collection of that com-

mission; indeed, its recovery was sought in a separate cause of action pleaded on the express theory of money received.*

The principal had sought recovery of both commissions on the pleaded theories of the agent's actual fraud (*i. e.*, in collecting a commission from the principal without disclosing the arrangements made with the dishonest executor), his conscious participation in the dishonest executor's breach of trust, and violation of agency duty. Recovery of the commission paid by the principal was also sought on the pleaded theory of mistake of fact.** Each of these causes of action, excepting that for actual fraud was governed by the straight six-year limitation prescribed for actions *ex contractu* (C. P. A., §48 [1]) or for damages in tort (C. P. A., §48 [3]).

The Court of Appeals held that an action for money received was not within the *Carr v. Thompson* doctrine an adequate remedy for the recovery of the commission collected from the principal, because the agent who obtained that commission had not retained it, and that the principal had an action for fraud which did not accrue until the facts were discovered, the limitation for which action was not controlled by that prescribed for actions for money received. This decision, of course, ignored the fact that actions *ex delicto* for breach of agency duty or for participation in a breach of trust were available, and that both were governed by a straight six-year limitation.

If *Wechsler's* case is a deviation from the "adequacy of remedy" doctrine of *Carr v. Thompson*, the recently decided case of *Nasaba Corp. v. Harfred Corp.*, 287 N. Y. 290 (1942), appears to be a clear departure from and rejection of that doctrine. In that case defendants became parties in 1929 to conveyances in fraud of the claims of plaintiff's assignor. Plaintiff subsequently acquired these claims, and thereafter reduced them to judgment. The facts remained undiscovered until 1940, when plaintiff sued to recover dam-

* *Wechsler* record, p. 17—"Fifth Cause of Action".

** *Wechsler* record, pp. 6-16—first four causes of action pleaded in complaint.

ages for fraud. Defendants asserted and succeeded in establishing in the Appellate Division the bar of limitations (261 N. Y. App. Div. 695). The "adequacy of remedy" doctrine of *Carr v. Thompson* was the sole ground on which it was sought to defend this decision in the New York Court of Appeals. Citing the applications of that doctrine in the *Brick* and *Hearn* cases (discussed at p. 35, *supra*), defendants pointed out that an action to set aside the fraudulent conveyances (under Article 10 of the New York Debtor and Creditor law) would have permitted the recovery of the value of the property so conveyed (*Murtha v. Curley*, 90 N. Y. 372), and that the prescriptive period for such an action (C. P. A., §53) had expired in 1939. Defendants urged further that complete remedies afforded by various New York statutes had become outlawed by an even shorter statute of limitations (C. P. A., §48).

But these contentions were rejected by the New York Court of Appeals, and the judgment for defendants was unanimously reversed because the plaintiff's "causes of action" did not "owe their existence exclusively" to the statutory provisions cited by defendants, and the complaint showed that the defendants were being charged with "deliberately secret, deceitful, undisclosed and fraudulent manipulation * * *." Concluding, the Court of Appeals said:

> "At least, where the complaint may be so construed as to state causes of action the prosecution of which is not barred by any statute of limitations, speculation as to what other cause of action may be sufficiently alleged to warrant recovery thereunder which may be barred by some statute of limitations should not be indulged in the absence of facts appearing upon the trial after the defenses upon which defendants rely have been presented by proper pleading and proof." (287 N. Y. 290, at 296.)

Should respondents seek to distinguish this decision placing the quietus on the "adequacy of remedy" doctrine stemming from *Carr v. Thompson*, and partially adhered to in *Wechsler v. Bowman*, *supra*, by pointing out that the

present suits were not held barred by limitations until after the issues had been exhaustively tried, the answer to such an argument, if made, is obvious. Respondents' admissions and the documents they created conclusively establish; a) that neither *Carr v. Thompson* nor *Wechsler v. Bowman* ever had application to the present suits because no remedy at law was ever available to decedent or to petitioners comparably adequate, certain and complete to that afforded in an equitable suit for an accounting; and b) no action for money received could be adequate because most of the profits derived from these frauds were neither obtained nor retained by the Bank and its officers.

Conclusion.

It is our submission that this petition presents questions of importance upon which there exist conflict of decision which call for resolution by this court.

Although respondents' admissions conclusively establish that upwards of $1,500,000 in profits were realized by palpable frauds, and then parcelled out among the Bank, its officialdom, directorate and associates, we do not ask that the writ be allowed because a great amount of money is involved.

But another consideration of public moment makes it desirable that this court take jurisdiction to the end that a decision on the merits be obtained. The Bank has succeeded in defeating other claims arising out of these transactions by a course of suppression and false swearing, instances of which are adequately sampled in Note 7 to Judge Frank's opinion. (Cf. 254 N. Y. App. Div. 128.) These facts established, its fraud now goes unscourged because it has been successful in suppressing the facts until such time as it could plead the statute of limitations. It would be one thing if an obscure individual sought to capitalize on such a situation; it is submitted to be quite another where a financial institution with resources exceeding $150,000,000 (Ex. P-169)—with all the power for good or evil that possession of such resources entails in a community the size of Buffalo—is found to be doing exactly that.

The New York statutes of limitations, even if applicable, are not a bar to the maintenance of these suits, and it is in the public interest that such proceedings be had in this court as will lead to their determination on the merits. The strictures laid by Judge Frank's opinion on the conduct and sworn statements of the Bank's officers and general counsel are such as to make it but fair to the public as well as those individuals that the merits be decided, and it is but courteous to suppose that respondents will desire this result and join in this application.

The writ of certiorari should issue.

Respectfully submitted,

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